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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THE PEOPLE OF THE STATE OF COLORADO,

Petitioners,

v.

ROBERT CHAVEZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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No.

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ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED FOR REVIEW

Is a criminal defendant's constitutional right to testify impermissibly burdened by a state procedure which allows the prosecution to use the defendant's admissions of prior convictions, properly elicited in the case-in-chief, as evidence of criminal habituality in a subsequent, bifurcated hearing on punishment?

PARTIES

The names of the parties in this case are listed in the caption of the case.

OPINION BELOW

The opinion of the Colorado Supreme Court is not yet reported but it is here included as appendix A-1.

JURISDICTION

The decision of the Colorado Supreme Court issued on January 5, 1981. The People's petition for rehearing was denied on January 26, 1981. The jurisdiction of this court is conferred by 18 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fifth amendment to the United States Constitution.

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war of public danger; nor shall any person be subject for the same offense to twice be put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor shall be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

Section one of the fourteenth amendment of the United States Constitution.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the states wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The Colorado Habitual Criminal Act. Colo. Rev. Stat. Ann., Section 16-13-101, 103 (1973) (here included at appendix A-26).

The Colorado witness statute. Colo. Rev. Stat. Ann., Section 13-90-101 (1973) (here included at appendix A-28).

STATEMENT OF THE CASE

In May of 1978, Robert Chavez was convicted of second-degree burglary and first-degree criminal trespass in violation of Colo. Rev. Stat. Ann. section 18-4-203, 18-4-502 (repl. vol. 1978). He was caught in the act of burglarizing another's home. Because Mr. Chavez had suffered prior convictions, the prosecution also charged him as a habitual offender.

Two Colorado statutes were particularly important in the prosecution of the case. The first, Colo. Rev. Stat. Ann. section 13-90-101 (1973), permits the prosecution to impeach the credibility of a testifying defendant by showing prior felony convictions or by soliciting, on cross-examination, the defendant's admission that he had been previously convicted. Provided that the jury is properly instructed as to the narrow purpose for which it can consider the fact of prior convictions, the statute has been repeatedly upheld as constitutional. *People v. Layton*, ____ Colo. ____, 612 P.2d 83 (1980); *People v. Henry*, 195 Colo. 309, 578 P.2d 1041 (1978).

The second important statute is the Colorado habitual criminal statute, Colo. Rev. Stat. Ann. section 16-13-101, 103 (repl. vol. 1978). Subsection 4 of section 103 of that law establishes a bifurcated trial process to determine if punishment may be enhanced against a defendant who was a habitual offender if the defendant is not a witness in his own behalf on the principal charge. Subsection 5 allows both the principal charge and the fact of prior convictions to be considered by the jury simultaneously if the defendant has taken the stand and denied his previous convictions, and, in rebuttal, the prosecution has presented competent evidence of their existence. The statute is not explicit on the proce-

dure to be followed if the defendant testifies and admits his previous convictions. However, there is Colorado precedent holding that this obviates the necessity of bifurcating the trial. *Mitchell v. People,* 137 Colo. 5, 320 P.2d 342 (1958); *Hackett v. Tinsley,* 143 Colo. 203, 352 P.2d 799 (1960) *cert. denied,* 364 U.S. 874 (1960).

Faced with these legal circumstances, Mr. Chavez told the trial court that he would not testify because he might be impeached by a showing of his prior convictions and this, in turn, would result in a loss of a separate determination of habituality (ff. 977-995). The trial judge responded that, regardless of whether Chavez testified, the court would not allow the jury to know of or consider the separate counts alleging the prior convictions until after it had reached a verdict on the underlying charges (ff. 985-988).

The defendant did not take the stand. He was convicted of the two principal offenses. Subsequently, the trial court directed acquittal of the habitual counts.

Chavez contended that the procedure employed by the trial court "chilled" his right to testify on the merits and the Colorado Supreme Court agreed.

This case generated four written opinions by the Colorado Supreme Court and a four-to-three vote for reversal. The majority opinion noted that an accused has a dual fourteenth amendment due process right to testify in his own behalf, citing *Faretta v. California,* 422 U.S. 806, 819 n. 15 (1975), and to have the prosecution bear the burden of proof beyond a reasonable doubt as to all elements of the charged crime, citing *United States v. Morrissette,* 342 U.S. 246 (1952). The court found that the mere possibility that the accused's admissions as to prior convictions may constitute proof upon which the prosecution may later rely in a bifurcated habitual proceeding, was sufficient to create an "intolerable tension" between the two federal constitutional rights. It expressly held that the federal constitution demands that trial judges must rule, as a preliminary matter, that prosecutors must prove the existance of prior convic-

tions beyond the defendant's judicial admissions as a means of preventing the defendant's testimonial rights from being "chilled."

ARGUMENT

THE OPINION OF THE COLORADO SUPREME COURT THAT THE FEDERAL CONSTITUTION FORBIDS THE PROSECUTION FROM RELYING ON A DEFENDANT'S ADMISSIONS OF PRIOR CONVICTIONS TO ESTABLISH HIS STATUS AS A HABITUAL OFFENDER, IS CONTRARY TO DECISIONS OF THIS COURT AND SHOULD BE REVERSED BY THIS COURT.

This Court has repeatedly recognized that the federal constitution does permit the defendant to suffer factual consequential disadvantages inherent in his testimonial choice. If he testifies, he loses his silence privilege as to cross-examination on related matters, *Brown v. United States,* 356 U.S. 148 (1958), and forcing him to contemplate this probable damaging result does not unduly hamper the privilege. Similarly, the constitution does not forbid impeaching a testifying defendant by proof of prior convictions, *Spencer v. Texas,* 385 U.S. 554, 561 (1967), nor does it prohibit impeaching a testifying defendant with a prior confession not admissible in the prosecution's case-in-chief. *Harris v. New York,* 401 U.S. 22 (1971). Additionally, in *Williams v. Florida,* 399 U.S. 78 (1970), this court held that a state rule requiring a pre-trial notice of alibi did not unconstitutionally limit a criminal defendant's right of silence. And, in a case factually similar to the instant one, *McGautha v. California,* 402 U.S. 183 (1971), this Court recognized that a state statute allowing a jury to simultaneously hear and decide both the issue of guilt and punishment in a capital case did not unconstitutionally restrict the testimonial rights of a defendant who wished to testify solely on the issue of punishment but not have his testimony exposed to a jury considering also the issue of guilt.

McGautha made clear what the supreme court of Colorado now misunderstands and what the cases cited immediately above exemplify — that not every procedure which attaches some detriment to the choice of whether to testify is constitutionally unacceptable. Rather, the relevant inquiry is whether the potential adverse consequence is so direct and unnecessary that it unduly prevents fulfillment of a specific constitutional purpose. That conclusion, for a number of reasons, is simply unavailable in the instant case.

Since the majority of the Colorado Supreme Court correctly concedes that there is no constitutional infirmity with forcing a defendant to weigh the probable consequence of having his credibility impeached by a showing of prior convictions, and since the trial judge expressly ruled that he would protect the accused by not allowing the jury any knowledge of the recidivist charges until subsequent to the principal verdict, the only potential detriment to Chavez was the possibility that should he take the stand and admit his prior convictions, those admissions may be used by the prosecution at the subsequent hearing on habituality. (If, while testifying, he denied his prior offenses, the prosecution would have had to independently prove them by otherwise competent evidence even to impeach.) That sole possibility, the majority reasoned, effectively released the prosecution from its constitutionally imposed burden of proof beyond a reasonable doubt as to the "elements" of habituality. The reasoning is seriously flawed.

First, the burden of proof did not shift. The trial court expressly ruled that the defendant's admissions (should they have occurred) were merely evidence that the prosecution may or may not use in fulfilling its burden. There is nothing judicially foreign or unacceptable in using relevant testimony permissibly elicited from a defendant as evidence. It is competent evidence. *United States v. Carabbia*, 381 F.2d 133, 138 (6th cir. 1967); *cf. United States v. Calderon*, 348 U.S. 160, 164 (1954). Nor is such evidentiary use of the defendant's testimony constitutionally repugnant. As stated in *McGautha*, 402 U.S. at 213, "[i]t does no violence to the

privilege (against self-incrimination) that a person's choice to testify in his own behalf may open the door to otherwise inadmissible evidence which is damaging to his case." Here, as in *McGautha*, the testimonial choice was made not in contemplation of the consequence of relieving the burden of proof but rather in contemplation of providing the prosecution with some evidentiary ammunition it might otherwise not have. And, as in *McGautha*, that adversity in exercising the choice is not unconstitutionally restrictive.

Second, assuming the burden did shift, there is no indication that this is constitutionally impermissible. The majority assumes that one mission of the due process clause is to require the prosecution to bear the burden of proof beyond a reasonable doubt as to all "elements" of being a habitual offender. Although, as discussed above, this is not really the issue, it is important to examine the majority's thesis as it is the specific constitutional right which the majority viewed that the defendant would necessarily surrender by testifying. Consequently it is the source of the "intolerable tension" the trial court's procedure was perceived as having created.

Considering the prosecutorial burden of proof, this Court has held that the due process clause enforces on the state those notions, "which long experience in the common law tradition, to some extent embodied in the Constitution, has crystalized into rules of evidence consistent with that standard." *In re Winship*. 397 U.S. 358, 362 (1970), quoting *Brinegar v. United States*, 338 U.S. 160, 174 (1949). Punishment as a habitual offender is not a substantive crime but merely sentence enhancement. *Casias v. People*, 148 Colo. 544, 367 P.2d 327 (1967), *cert. denied*, 396 U.S. 862 (1963). It is not derived from the common law but is solely a creature of statute. The methods of determining prior offenses are varied. Some states require a jury determination in a bifurcated hearing, others decide habituality in the same proceeding, some allow the institution of the charge after conviction, others leave it to the trial judge, and yet others leave it as a determination for parole authorities. *Spencer v. Texas*, 385 U.S. at 566-567 (1967). The Court, in *Spencer*,

recognized these varying procedures and inferentially approved them while denying that the absence of bifurcation offended constitutional safeguards. Additionally, it has been held that sentence enhancement statutes need not place on the prosecution the burden of proof beyond a reasonable doubt as to those factors which occasion the enhancement. *United States v. Inendino,* 463 F. Supp. 252 (1978), *aff'd* 604 F.2d 458 (7th Cir. 1979), *cert. denied,* 444 U.S. 932 (1979). Collectively, these cases make clear that post-conviction proceedings need not provide the full panoply of trial rights and that the mandate of *Winship,* (cited in the concurring opinion) and *Morrissette,* (cited in the majority opinion) has no applicability to the present case. Whatever may be the parameters of procedural due process in establishing one's prior convictions so as to enhance his punishment, prohibiting the use of a defendant's judicial admission as evidence of habituality is certainly not a "crystallized notion" to any extent "embodied in the Constitution" which this court must now protect.

Third, the very nature of the remedy fashioned by the majority demonstrates the illusiveness of the perceived constitutional tensions. The majority ruled that if the prosecution proved the prior convictions over and above the defendant's admissions, then the "tension" would be relieved. In short, it held that the federal constitution required an evidentiary surplusage, additional proof of an admitted fact. The nature of the remedy indicates that the majority views the fourteenth amendment as performing no more substantive rule than inspiring redundancy. As this Court has articulated in this area, the "threshold question" is whether a state procedure "impairs to any appreciable extent any of the policies behind the rights involved." *McGautha v. California,* 402 U.S. at 213. The remedy here indicates clearly the absence of any substantive constitutional policy being protected.

CONCLUSION

As *Oregon v. Hass,* 420 U.S. 714, 719 (1975) clearly articulated, a state may not impose greater federal constitutional restrictions when this Court has refrained from doing so. In *McGautha v. California, supra,* this Court specifically refused to hold that the federal constitution prohibited using a defendant's trial testimony in a proceeding simultaneously determining guilt and punishment for a purpose beyond that which the defendant intended. More specifically, *McGautha,* held that a procedure which forced that option, or silence, upon a defendant did not unconstitutionally impede a defendant's testimonial rights. The Colorado Supreme Court's contrary result in the instant case cannot be allowed to stand under the principle of *Oregon v. Hass, supra,* and Sup. Ct. R. 17.1(c)

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IN THE SUPREME COURT OF COLORADO
No. 79SA358

THE PEOPLE OF THE STATE OF COLORADO,	)	
Plaintiff-Appellee,	)	
v.	)	January 5, 1981
ROBERT CHAVEZ,	)	
Defendant-Appellant.	)	

Appeal from the District Court of Adams County

Honorable Harlan R. Bockman, Judge

EN BANC JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS

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JUSTICE DUBOFSKY delivered the Opinion of the Court.

JUSTICE QUINN concurs and specially concurs.

JUSTICE ERICKSON concurs and joins in special concurrence.

CHIEF JUSTICE HODGES dissents, and JUSTICE LEE and JUSTICE ROVIRA join in dissent.

JUSTICE LEE dissents, and CHIEF JUSTICE HODGES and JUSTICE ROVIRA join in dissent.

The defendant, Robert Chavez, appeals his jury conviction for first-degree criminal trespass, section 18-4-502, C.R.S. 1973 (now in 1978 Repl. Vol. 8), and conspiracy to commit second-degree burglary, section 18-2-201, C.R.S. 1973 (1978 Repl. Vol. 8). The defendant was also charged with second-degree burglary, section 18-4-203, C.R.S. 1973 (1978 Repl. Vol. 8), and with four counts of habitual criminality, section 16-13-101, C.R.S. 1973 (1978 Repl. Vol. 8). The jury acquitted him on the second-degree burglary charge, and the trial court granted a motion for judgment of acquittal on the habitual criminal charges. We reverse the convictions for first-degree criminal trespass and conspiracy to commit second-degree burglary.

At the close of the prosecution's case on the substantive charges, the defendant moved to exclude any testimony he might give in defense of the substantive charges from the habitual criminal proceedings. The trial court ruled that impeachment evidence of the defendant's prior convictions elicited or offered by the prosecution during the trial of the substantive offense could be used for substantive purposes in the habitual criminal trial. On appeal the defendant argues that the trial court's denial of his motion unconstitutionally burdened his right to take the witness stand in his own defense.[1] We agree.

The defendant chose not to testify and was acquitted of the habitual criminal charges; however, he was convicted, without testifying, of first-degree criminal trespass and conspiracy to commit second-degree burglary. Had he chosen to testify in his own defense on the trespass and burglary charges, he understood that an admission of the prior convictions charged in the habitual criminal counts would, upon conviction of the substantive crime, lead to automatic imposition of a life sentence under the habitual criminal statute.[2]

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[1] The defendant also alleges that his conspiracy conviction was based upon insufficient evidence and was inconsistent with acquittal of second-degree burglary. We need not reach these contentions.

[2] Section 16-13-101(2), C.R.S. 1973 (1978 Repl. Vol. 8).

It is useful to review the habitual criminal statute, particularly section 16-13-103, C.R.S. 1973 (1978 Repl. Vol. 8), to understand the defendant's constitutional claim.

> "(4) If the defendant denies that he has been previously convicted as alleged in [the habitual criminal counts] . . . the jury impaneled to try the substantive offense shall determine by separate verdict whether the defendant has been convicted as alleged. The procedure in any case *in which the defendant does not become a witness in his own behalf* upon the trial of the substantive offense shall be as follows:
>
> (a) The jury shall return a verdict upon the issue of guilt or innocence;
>
> (b) If the verdict is that the defendant is guilty of a felony, then the same jury shall forthwith proceed to try the issues as to whether the defendant has been previously convicted as charged. The prosecuting attorney has the burden of proving beyond a reasonable doubt that the defendant has been convicted as charged.[3]
>
> (5) If upon the trial of the issues upon the substantive offense, *the defendant takes the witness stand in his own defense* and *denies* that he has been previously convicted as alleged, the defendant, and the prosecuting attorney on rebuttal, shall present all evidence relevant to the issues of previous convictions, and the jury shall return verdicts on all issues relating to previous convictions if the defendant is found guilty of the substantive offense."
>
> [Emphasis added.]

The statute does not explicitly delineate the procedures to be followed at trial if the defendant takes the witness

[3] Bifurcation avoids prejudice to the defendant in the initial determination of the issue of guilt by keeping from the jury the defendant's propensity to commit crimes. *People v. Lucero*, ____ Colo. ____, 615 P.2d 660 (1980); *see People v. Fullerton*, 186 Colo. 97, 525 P.2d 1166 (1974).

stand and *admits* that he has been convicted previously as alleged. However, subsections (1) and (3) appear to obviate the necessity of proving the previous convictions alleged in the habitual criminal counts if the defendant admits them during his testimony on the substantive charges:

> "(1) If the fact of previous convictions of other offenses is included in an indictment or information, the jury, if it finds a verdict of guilty of the offense with which he is charged, *unless the defendant admits the previous convictions,* shall also find whether or not he has suffered such previous convictions.
>
> * * *
>
> (3) Upon arraignment of the defendant he shall be required to admit or deny that he has been previously convicted of the crimes identified in the [habitual criminal charges] . . . . If the defendant stands mute it shall be treated as a denial by him that he has been convicted as alleged. If the defendant admits that he has been convicted as alleged in any one or more of the counts charging previous convictions, no proof thereof is required, and upon conviction of the substantive offense, the court shall pass sentence upon the defendant as an habitual criminal."

Moreover, we have said that if the defendant chooses to admit his prior felony convictions in the trial on the substantive charges, "his opponent is relieved of the necessity for proving any fact so admitted" in connection with habitual criminal counts. *Hackett v. Tinsley,* 143 Colo. 203, 352 P.2d 799, *cert. denied,* 364 U.S. 874, 81 S.Ct. 118, 5 L.Ed.2d 96 (1960).[4]

If the defendant wishes to testify on the substantive charges, he must anticipate cross-examination about his

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[4] *Hackett* was decided under the "Little Habitual Criminal Act," section 39-13-1, C.R.S. 1953. We overrule all language in *Hackett* which is inconsistent with this opinion.

prior criminal record.[5] This prospect confronts him with a dilemma. On cross-examination, he may deny his prior felony convictions and face submission to the jury in the trial on the substantive charge of all evidence relevant to the issues of previous convictions, section 16-13-103(5), or he may admit his prior criminal record and, by testifying to matters which he believes will disprove the substantive charges against him, attempt to avoid the mandatory life sentence to which his admission and a conviction of the substantive offense would otherwise lead. [A defendant cannot be sentenced as an habitual criminal until he is convicted of the underlying substantive charge, section 16-13-103(4)(b).]

An accused in a state criminal trial has a Fourteenth Amendment due process right to testify in his own behalf. *Faretta v. California,* 422 U.S. 806, 819 n. 15, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). A defendant also has a constitutional due process right to proof by the prosecution of all elements of the crime charged against him. *Morrissette v. United States,* 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952); *People v. Hill,* 182 Colo. 253, 512 P.2d 257 (1973). The defendant facing habitual criminal charges is forced to choose between his constitutional right to testify in his own defense and his constitutional right to have the State prove the elements of habitual criminality. If he chooses to testify about his past record, the prosecution is relieved of its burden of proving the elements of habitual criminality.[6] The statutory procedure here suffers from the same flaw the United States Supreme Court condemned in *Simmons v. United States,* 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968): it creates an intolerable tension between two constitutional rights. *See also People v. Coleman,* 13 Cal.3d 867, 533 P.2d 1024, 120

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[5] Section 13-90-101, C.R.S. 1973; *People v. Layton,* ___ Colo. ___, 612 P.2d 83 (1980); *People v. Griggith,* 197 Colo. 544, 595 P.2d 231 (1979); *People v. Thompson,* 197 Colo. 299, 592 P.2d 803 (1979).

[6] Our statutory scheme discourages a defendant from testifying. Promotion of truthful testimony in a judicial proceeding serves "the imperative of judicial integrity." *See Elkins v. United States,* 364 U.S. 206, 222, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960); *Terry v. Ohio,* 392 U.S. 1, 12, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1967).

Cal.Rptr. 384 (1975); *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971); *People v. Rosenthal*, ____ Colo. ____, 617 P.2d 551 (1980).

As a remedy for this constitutional dilemma, the defendant argued to the trial court, first, that he was entitled to a bifurcated proceeding on the habitual criminal counts notwithstanding a decision to testify in his own behalf at his trial on the substantive offenses and, second, that any evidence of prior convictions elicited from him during the first stage of the trial should be excluded from the subsequent habitual criminal proceedings. The trial court ruled that it would conduct bifurcated proceedings whether or not the defendant took the witness stand, but held that the district attorney was entitled to impeach the defendant's testimony by eliciting or introducing evidence of his prior felony convictions and that the jury could consider this prior conviction evidence for substantive purposes in its deliberations on the habitual criminal charges.

The trial judge recognized that the statute and case law construing it[7] dispense with a bifurcated proceeding if the defendant chooses to testify; however, the judge ruled that the existence of habitual criminal charges were to be kept from the jury until it reached a verdict on the substantive counts.[8] Once the jury returned a verdict of guilty, the trial court would submit the habitual criminal counts to the jury in what the court characterized "a bifurcated proceeding." By withholding the habitual criminal counts from the jury until it had reached a verdict on the substantive charges, the trial court presumably meant to dispel the prejudicial effect foreknowledge of those counts might otherwise exert on the jury's deliberations.[9] The trial court did not specify the steps

[7] *People v. Trujillo*, 40 Colo. App. 220, 577 P.2d 297, (1977); *Mitchell v. People*, 137 Colo. 5, 320 P.2d 342 (1958); *Wolff v. People*, 123 Colo. 487, 230 P.2d 581 (1951); *Routa v. People*, 117 Colo. 564, 192 P.2d 436 (1948).

[8] Defense counsel recommended and the court adopted a procedure suggested by the dissenting opinion in *Routa v. People*, *supra*.

[9] Of course, the defendant would not be insulated from the prejudice attributable either to his testimonial admission of prior convictions or to other evidence of prior convictions adduced by the prosecution to impeach his testimony.

to be followed in the habitual criminal proceeding other than stating that prior conviction evidence could be considered by the jury for substantive purposes in its deliberations on the habitual criminal counts.

Because the Habitual Criminal statute fails to explicitly delineate the procedures trial courts are to adopt if a defendant chooses to testify in connection with the substantive charges against him and admit his prior convictions, it was not inappropriate for the trial court to "bifurcate" the proceedings in this case.[10] However, the court's ruling failed to cure the fundamental defect in the statutory scheme. As we have noted above, that infirmity is not the prejudice to a defendant which ordinarily accompanies evidence that he has committed other crimes. *Cf. Stull v. People*, 140 Colo. 278, 344 P.2d 455 (1959); *People v. Honey*, ____ Colo. ____, 596 P.2d 751 (1979).[11] The law is settled that, notwithstanding its inherent prejudiciality, evidence of prior criminal convictions may properly be admitted to impeach the credibility of a defendant's testimony. *See* section 13-90-101, C.R.S. 1973. Rather, the basic defect in the Habitual Criminal statute is the intolerable tension it creates between a defendant's twin constitutional rights to testify in his own defense and to have the prosecution prove each element of the several counts with which he is charged. The impeachment use of an admission of prior convictions elicited from a defendant who chooses to testify is permissible. However, the substantive use of that same evidence to relieve the prosecution of its statutory and constitutional burden of proving the elements of a separate status, habitual criminality, by introducing evidence independent of the defendant's

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[10] To the extent they are inconsistent with this opinion, we over-rule *People v. Trujillo, supra; Mitchell v. People, supra; Wolff v. People, supra; Routa v. People, supra.*

[11] Under section 16-13-103(5), introduction of such evidence and a unitary trial are mandatory if a defendant takes the stand and denies that he was previously convicted as charged. Here the trial court apparently believed there was an additional, unacceptable risk that the jury's deliberations on the substantive charges would be unduly swayed by instructing them that the defendant had also been charged as an habitual criminal. *See People v. Lucero, supra.*

testimony such as duly authenticated records of a defendant's prior convictions,[12] impermissibly burdens the exercise of a defendant's right to testify in his own behalf. This tension can only be alleviated by compelling the prosecution to shoulder the burden of proving those convictions, either in the manner specified by the statute or by independent evidence, irrespective of the evidence elicited from a defendant who chooses to answer the substantive charges against him by testifying in his own behalf.[13]

The trial court's ruling that evidence of the defendant's prior convictions elicited during his trial on the substantive charges, would be admissible for substantive purposes in the habitual criminal proceeding was an error which its "bifurcation" of the jury's deliberations failed to remedy. Instead, when the defendant expressed a desire to testify on his own behalf and requested a bifurcated proceeding, the trial court should have ruled that it would (1) instruct the jury to consider any admissions of prior convictions elicited from the defendant in connection with his testimony on the substantive offense *only* as they affect his credibility, *Diaz v. People,* 161 Colo. 172, 420 P.2d 824 (1966), and (2) that the prosecution must meet its burden of proving beyond a reasonable doubt the defendant's prior convictions by evidence independent of the defendant's testimony or duly authenticated records of those convictions. *O'Day v. People,* 114 Colo. 373, 166 P.2d 789 (1946).

Because the trial court's ruling impermissibly burdened the defendant's right to testify in his own defense by relieving the prosecution of the burden of proving the charges against him beyond a reasonable doubt, the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

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[12] Sections 16-13-102 and 16-13-103(4)(b).

[13] It is well settled that whenever possible a statute should be construed to reduce constitutional infirmities. Section 2-4-201(1)(a), C.R.S. 1973; *People v. Washburn,* 197 Colo. 419, 593 P.2d 962 (1979).

JUSTICE QUINN concurs and specially concurs.

JUSTICE ERICKSON concurs and joins in special concurrence.

CHIEF JUSTICE HODGES dissents, and JUSTICE LEE and JUSTICE ROVIRA join in dissent.

JUSTICE LEE dissents, and CHIEF JUSTICE HODGES and JUSTICE ROVIRA join in dissent.

JUSTICE QUINN concurring and specially concurring:

I concur in the well-reasoned opinion of the court written by Justice Dubofsky. That opinion is based on sound and longestablished judicial prededent. It applies that precedent in a manner that accords the defendant his constitutional due and responsibly salvages the habitual criminal statute from what otherwise would have been an irreparable constitutional infirmity.

A charge of habitual criminality is *sui generis*. The legislature recognized the unique nature of this status by establishing strict statutory procedures for its determination, including proof of the prior convictions beyond a reasonable doubt. Section 16-13-103(4)(b), C.R.S. 1973 (1978 Repl. Vol. 8). With good reason this court consistently has construed these statutory procedures strictly in favor of the accused. *See, e.g., People v. Lucero,* ____ Colo. ____, 615 P.2d 660 (1980); *Vigil v. People,* 196 Colo. 522, 587 P.2d 1196 (1978); *DeGesualdo v. People,* 147 Colo. 426, 364 P.2d 374 (1961); *Smalley v. People,* 116 Colo. 598, 183 P.2d 558 (1947). Short of a conviction for a capital offense, no more serious adjudication can befall an accused in our criminal justice system. In contrast to the Federal Dangerous Special Offender Act, 18 U.S.C. § 3575, which incorporates a principle of proportionality and allows sentencing discretion, *see Rummel v. Estelle,* 445 U.S. 263, 299-30 and n. 20, 100 S. Ct. 1133, 1152-53 and n. 20, 63 L. Ed. 2d 382, 407 and n. 20 (1980) (Powell, J., dissenting), a person adjudged a habitual criminal under section 16-13-101(2), C.R.S. 1973 (1979 Supp.) "shall be punished by imprisonment in a correctional facility for the term of his or her natural life."

I.

That the majority holding is consistent with the doctrine of unconstitutional conditions cannot be questioned. In *Griffin v. California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), the United States Supreme Court found re-

versible constitutional error in a California constitutional provision authorizing the court to instruct jurors that they may draw unfavorable inferences from a defendant's failure to explain or deny matters within his knowledge. The court said of such procedure: "It is a penalty imposed by the courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U.S. at 614, 85 S. Ct. at 1232-33, 14 L. Ed. 2d at 109-110. In *Simmons v. United States,* 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968), the Supreme Court held that a defendant's suppression testimony may not be admitted against him at trial as evidence of guilt because to do so would deter the defendant "from presenting the testimonial proof . . . necessary to assert a Fourth Amendment claim." 390 U.S. at 392-93, 88 S. Ct. at 975, 19 L. Ed. 2d at 1258. Under these circumstances the court found it "intolerable that one constitutional right should have to be surrendered in order to assert another." 390 U.S. at 394, 88 S. Ct. at 976, 19 L. Ed. 2d at 1259. Again this principle was applied in *United States v. Jackson,* 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968). There, the Supreme Court found the death penalty provision of the Federal Kidnapping Act unconstitutional because it needlessly chilled the exercise of the defendant's basic constitutional right to a jury trial:

> "The question is not whether the chilling effect is 'incidental rather than intentional; the question is whether that effect is unnecessary and therefore excessive. In this case the answer to that question is clear.
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> * * *
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> "Whatever the power of Congress to impose a death penalty for violation of the Federal Kidnapping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right.
>
> * * *

> "A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right." 390 U.S. at 582-83, 88 S. Ct. at 1216-17, 20 L. Ed. 2d at 147-48.

It is also an axiom no longer debatable that an accused has the constitutional right to require the state to prove his guilt beyond a reasonable doubt on every essential element of a criminal charge. *E.g., In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *accord, Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975); *Smith v. Smith*, 454 F.2d 572 (5th Cir. 1971); *cert. denied*, 409 U.S. 885, 93 S. Ct. 99, 34 L. Ed. 2d 141 (1972); *Stump v. Bennett*, 398 F.2d 111 (8th Cir. 1968); *cert. denied*, 393 U.S. 1001, 89 S. Ct. 483, 21 L. Ed. 2d 466 (1968). In fact, this court in *People v. District Court*, 165 Colo. 253, 439 P.2d 741 (1968), had no difficulty in concluding that a statutory provision relieving the prosecution of that burden was constitutionally flawed under state due process doctrine. Implicit in the concept of due process is the fundamental principle that the state must prove to the satisfaction of the jury beyond a reasonable doubt all the material elements necessary to constitute the offense charged. *People v. District Court, supra; Leonard v. People*, 149 Colo. 360, 369 P.2d 54 (1962); *Kent v. People*, 8 Colo. 563, 9 P. 852 (1885). A statutory scheme relieving the state of that burden would collide head-on with Article II, Section 25, of the Colorado Constitution. *People v. District Court, supra.*

Nor can anyone seriously question the constitutional right of an accused in a criminal case to testify in his own defense. The United States Supreme Court in *Brooks v. Tennessee*, 406 U.S. 605, 612, 92 S. Ct. 1891, 1895, 32 L. Ed. 2d 358, 364 (1972), noted that "nw]hether the defendant is to testify is an important tactical decision as well as a matter of constitutional right." *See also, e.g., Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971). The Second Circuit Court of Appeals characterized this right "as having an importance similar to the right to be present

at one's trial and to present a defense." *United States v. Bentvena*, 319 F.2d 916, 943 (2d Cir. 1963), *cert. denied sub. nom. Ormento v. United States*, 375 U.S. 940, 84 S. Ct. 345, 11 L. Ed. 2d 271 (1963). This right is so inherently personal and fundamental that it can be waived only by the defendant and not his attorney. *Winters v. Cook*, 489 F.2d 174 (5th Cir. 1973). No defendant should "be deprived of exercising that right and conveying his version of the facts to the court of jury. . . ." *Hughes v. State*, 513 P.2d 1115, 1119 (Alaska 1973); *accord, State v. Noble*, 109 Ariz. 539, 514 P.2d 460 (1973); *People v. Robles*, 2 Cal. 3d 205, 466 P.2d 710, 85 Cal. Rptr. 166 (1970). In short, the right to testify in one's own defense cannot be eroded or needlessly chilled without running afoul of the Due Process Clause of the United States and Colorado Constitutions. *U.S. Const.* Amend. XIV; *Colo. Const.* Art. II, Sec. 25.

In this case the defendant was put to a Hobson's choice. He could decline to testify and thereby relinquish his constitutional right to convey his version of the facts to the jury, or he could take the stand and thereby forego his constitutional right to require the state to prove his habitual criminality. A defendant in a criminal case is entitled to all his constitutional rights. "nHme cannot be forced to barter one for the other. When the exercise of one right is made contingent upon the forebearance of another, both rights are corrupted." *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 120 (3d Cir. 1977).

The dissenting opinions notwithstanding, the plain and simple fact is that the unrestricted prosecutorial use of a defendant's testimonial admission of prior convictions — the impeachment use on the principal charge and the substantive use on the charge of habitual criminality — would needlessly penalize the defendant for asserting his constitutional right to testify in his own defense on the principal charge. The construction of the habitual criminal statute formulated by Justice Dubofsky is absolutely essential to the constitutional viability of that statutory scheme.

II.

I also agree with the majority that "it was not inappropriate for the trial court to 'bifurcate' the proceedings in this case." However, I would go a step further. Because of the innuendo of depravity that is implicit in the charge of habitual criminality, all trials involving that status determination should be bifurcated, whether the defendant elects to testify on the principal charge or not. Only if and when the jury finds the defendant guilty of the principal charge should the jury be advised of an hear evidence on the separate counts of habitual criminality. It is my belief that "[t]he statutory procedures mandate a bifurcated trial . . . precisely to obviate the prejudicial effect of prior convictions on the trial of the substantive offense." *People v. Lucero*, ____ Colo. ____, ____, 615 P.2d 660, 666 (1980).

Although admittedly the defendant's prior felony convictions will be admitted for impeachment purposes when he testifies in defense of the principal charge, the jury nevertheless will be clearly instructed at that point that this evidence should be considered by them for the purpose of evaluating the defendant's credibility as a witness and for no other purpose. It is quite another matter, however, to inform the jury, prior to the resolution of the principal charge, that upon his conviction of that charge the defendant stands charged with habitual criminality due to his past misdeeds. With the defendant facing the prospect of life imprisonment for habitual criminality upon conviction of the principal charge, section 16-13-101(2), C.R.S. 1973 (1979 Supp.), fundamental fairness requires no less than strict bifurcation in these cases.

I am authorized to say that Justice Erickson joins me in this concurring and special concurring opinion.

CHIEF JUSTICE HODGES dissenting:

I respectfully dissent and firmly disagree with the reversal of this defendant's conviction.

The majority holds that the defendant was unconstitutionally prevented from taking the witness stand in his own defense because the trial court did not properly advise the defendant with regard to the impact of certain provisions of the habitual criminal statute, section 16-13-101 *et seq.*, C.R.S. 1973 (1978 Repl. Vol. 8). The majority reasons that the statute permits evidence of a defendant's prior felony convictions to be elicited from him by the prosecution for impeachment purposes and to then be used to satisfy the People's burden of proving the defendant's prior felony convictions for purposes of the habitual criminal charges. The majority concludes that this creates an intolerable tension between a defendant's twin rights to testify in his own defense and to have the prosecution prove beyond a reasonable doubt each element of the several charges against him. From my analysis of the habitual criminal statute, and particularly section 16-13-103, C.R.S. 1973 (1978 Repl. Vol. 8), the majority misconceives the meaning and requirements of the statute.

Unless a defendant admits, either at arraignment or later, that he has been convicted of the prior felonies, the prosecution must prove beyond a reasonable doubt that he has been so convicted as charged. *People v. Hill*, 182 Colo. 253, 512 P.2d 257 (1973); *Vigil v. People*, 196 Colo. 522, 587 P.2d 1196 (1978); *O'Day v. People*, 114 Colo. 373, 166 P.2d 789 (1946). At arraignment, a defendant must either admit or deny that he has previously been convicted of the crimes identified in the information or indictment.[1] Section 16-13-103(3), C.R.S. 1973 (1978 Repl. Vol. 8). If the defendant

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[1] If the defendant stands mute, it is treated as a denial. Section 16-13-103(3).

admits that he has been convicted as alleged, no further proof thereof is required. Section 16-13-103(3). *People v. Litsel*, 192 Colo. 19, 555 P.2d 974 (1976). If the defendant denies that he has previously been convicted as alleged, the jury impaneled to try the substantive offense charged shall also by a separate verdict determine whether the defendant has been convicted as alleged. Section 16-13-103(4). It is only after the jury has determined that the defendant is guilty of the substantive offense that the jury shall " * * proceed to try the issues as to whether the defendant has been previously convicted as charged. The prosecuting attorney has the burden of proving beyond a reasonable doubt that the defendant has been convicted as charged." Section 16-13-103(4)(b). *See also Vigil v. People, supra.*

If the defendant takes the witness stand in his own defense, he may be impeached by evidence of his prior felony convictions. Section 13-90-101, C.R.S. 1973. If a defendant takes the stand and denies during the trial of the substantive offense that he has been convicted as alleged, the prosecution on rebuttal must then present all evidence relevant to the defendant's prior felony convictions. Such evidence serves not only for impeachment purposes but also for sentence enhancement. Section 16-13-103(5). This section provides that "if the defendant is found guilty of the substantive offense" the jury will thereupon return verdicts on all issues relating to previous convictions.

The obvious import of this section is that, until the jury deliberates solely on the substantive offense and returns a verdict of guilty, it is not to be informed of the habitual criminal charges. Only after it returns this verdict on the substantive offense may the jury be instructed on the issues relating to the habitual criminal charges. To advise the jury in any way that habitual criminal charges are also pending before the trial has been completed and the jury has returned its verdict on the substantive offense would certainly constitute reversible error. Had this occurred in the present case, the defendant's conviction should be reversed. This did not occur.

The trial court correctly interpreted this section and ruled after the prosecution rested that whether or not this defendant took the stand he would be afforded a bifurcated proceeding. The defendant, nevertheless, did not choose to take the stand during the trial of the substantive charges.

If the defendant admits at arraignment that he has been convicted as alleged in any one or more of the counts charging previous convictions, then no further proog need be presented. Section 16-13-103(3). Implicit in this statutory scheme is the corollary that if the defendant admits on the witness stand that he has been previously convicted the prosecution is also relieved of introducing additional proof of the convictions. *Vigil v. People, supra; Hackett v. Tinsley,* 143 Colo. 203, 352 P.2d 799 (1960), *cert. denied,* 364 U.S. 874, 81 S.Ct. 118, 5 L.Ed.2d 96 (1960). *See generally* IX *Wigmore, Evidence* § 2588 *et seq.* (1940). The jury may consider such admissions when the habitual criminal issues are before it for determination. Of course, the prosecution is not precluded from presenting additional evidence in support of the habitual criminal conviction allegations.

It is important to note that the defendant attacked the constitutionality of that portion of the habitual criminal statute which he claims collapses the bifurcated trial into one proceeding if the defendant takes the witness stand during the first proceeding and his prior felony convictions — which are the basis for the habitual criminal charges — are exposed to the jury. Sections 16-13-103(1) and (5). The defendant asserts that the exposure of his prior felony convictions unduly prejudices a defendant with respect to the main charges and that this then creates an added unconstitutional chilling effect on his right to testify. Because of the statutory procedure which the court advised the defendant it would follow in this case had the defendant taken the stand, this argument has no merit. As stated previously, section 16-13-103(5) must be interpreted to require a bifurcated procedure. The potential prejudice to a defendant is not in any way increased beyond that resulting from the use of prior felony convictions for impeachment purposes. When a

defendant takes the witness stand in his own defense, regardless of whether habitual criminal charges are pending, the People are free to question him with regard to his prior felony convictions for impeachment purposes. Section 13-90-101, C.R.S. 1973. An appropriate cautionary instruction should always be given to the jury. *Stull v. People*, 140 Colo. 278, 344 P.2d 455 (1959). This procedure has been statutorily authorized and consistently upheld by this court in the face of numerous constitutional challenges over the years. *E.g., People v. Layton*, ____ Colo. ____, 612 P.2d 83 (1980).

The majority opinion in effect is advancing a new and novel rule of law that a judicial admission by a defendant that he has been previously convicted cannot be considered as proof of that fact by the jury before whom the issue is being tried; and that the prosecution must, in effect, reprove the fact already admitted. In my view, this requirement is without reason, logic, or judicial precedent, and serves no valid procedural purpose.

In sum, the defendant's contention, that the application of the statute unconstitutionally burdened his right to testify, simply has no merit under the trial courts' ruling in this case, which was carefully formulated so as to protect the defendant from any fundamental unfairness, and was thoroughly explained to the defendant before he made his decision not to testify.

I would affirm the defendant's conviction.

I am authorized to say that JUSTICE LEE and JUSTICE ROVIRA join me in the dissent.

NO. 79SA358 - *PEOPLE v. CHAVEZ*

JUSTICE LEE dissenting.

I join in the dissent of CHIEF JUSTICE HODGES.

In my view, no valid reason has been advanced why the conviction in this case should be overturned.

Preliminarily, it should be noted that the defendant's guilt was overwhelmingly established. The defendant was observed by five officers breaking and entering into the house which he was accused of burglarizing. He was captured as he left by the rear door, attempting to avoid capture by the arresting officers. The conviction should not be reversed unless substantial prejudicial error occurred in the trial. None has been demonstrated in my view.

I concur in the Chief Justice's exposition of the procedural requirements under the habitual criminal statute. The trial judge's ruling, in my view, conformed with such requirements. The record of the colloquy between defendant, his counsel, and the court clearly indicates that the court's ruling fully protected the defendant's right to a fair trial on the substantive offense. There is nothing in the record to indicate that the trial jury had any knowledge whatsoever of the pending habitual criminal charges. It is apparent that throughout the prosecution's case no mention had been made to the jury of those charges or of the defendant's prior criminal record.

At the conclusion of the prosecution's evidence, the court advised the defendant that it would bifurcate the trial of the habitual criminal charges from the trial of the substantive offense. It further advised the defendant that if he took the stand to testify in his own behalf evidence of the prior convictions would be admissible for the purposes of impeachment only during the substantive trial. This conformed to defense counsel's understanding as to the procedural requirements. The record shows that, after so being advised by the court, the defendant consulted with his coun-

sel. Thereafter, he indicated to the court that he understood the consequences of testifying and being cross-examined concerning his prior convictions. He then elected not to testify in his own defense.

An important consideration is the concept that the Habitual Criminal Act does not create a substantive crime. *Casias v. People,* 148 Colo. 544, 367 P.2d 327 (1961), *cert. denied,* 396 U.S. 862, 82 S. Ct. 952, 8 L.Ed.2d 20 (1963); *Wright v. People,* 116 Colo. 306, 181 P.2d 447 (1947). The Act only prescribes circumstances where one found guilty of a specific substantive offense shall be more severely penalized if he has been previously convicted of crimes. As a sentence enhancement statute, the process concerns only the historical fact of the defendant's previous convictions.

The burden of proving that fact beyond a reasonable doubt is upon the prosecution. Section 16-13-103(4)(b), C.R.S. 1973 (1978 Repl. Vol. 8). This may be established by testimony, documentary evidence, section 16-13-102, or by a judicial admission, either at arraignment or in testimony, section 16-13-103(3), (4), and (5).

The significant underlying consideration inpursuing the determination of habitual criminality is the formulation of a procedure which guards against the jury trying the substantive offense from being improperly exposed to the knowledge of the existence of the habitual counts or of evidence of the prior convictions before that jury has determined the issue of the defendant's guilt of the substantive offense. Fundamental fairness and due process mandate that a defendant only be convicted on evidence relevant to the offense of which he is accused and being tried. Evidence of prior convictions is not relevant to prove guilt except in very limited circumstances. *People v. Honey,* ____ Colo. ____, 596 P.2d 751 (1979); *Stull v. People,* 140 Colo. 278, 344 P.2d 455 (1959).

In the present case, the procedures which the court ruled it would follow afforded the defendant the protection that he could only be convicted of the substantive offense

upon evidence properly admitted. Of course, if the defendant elected to testify, the impeachment evidence based on his prior convictions — the same evidence which formed the basis of the habitual counts — could properly be admitted. Section 13-90-101, C.R.S. 1973.

Initially, the defendant must elect whether he will subject himself on cross-examination to exposure of his prior criminal convictions by testifying in his own behalf at his trial on the substantive offense. This hard decision is created by his own prior criminal conduct since under the long-established rule of evidence prior criminal convictions are held to bear upon the credibility of the witness. If he elects to testify and admit those facts, simply because they bear only upon his credibility in no way diminishes their character as judicial admissions of the historic fact of prior convictions. Because the court here ruled that the guilt trial should be totally separated from the habitual criminal proceedings, and since the use of the judicial admissions would not occur until after a jury verdict of guilty at the trial of the substantive offense, the use of the judicial admissions in aid of proof of the habitual counts could in no way offend due process or the fundamental fairness required at trial. Such judicial admissions are no less competent to prove the facts admitted than are admissions of the habitual counts at arraignment, or if obtained in any other separate judicial proceeding.

In my view, the ban of the use at the habitual proceeding of impeachment evidence of prior convictions admitted by a defendant while testifying as a witness in his own behalf does not afford a defendant any additional protection against unjustly being convicted on inadmissible evidence at the substantive trial.

The majority has applied the rationale of *Simmons v. United States,* 390 U.S. 377, 88 S. Ct. 967, 19 L.Ed.2d 1247 (1968) to reach the conclusion that the trial court erred in ruling that, if the defendant elected to testify at the guilt trial, any admissions resulting from cross-examination as to prior convictions would be admissible as evidence at the habitual criminal proceeding to establish the fact of the

prior convictions. The majority has concluded that, if such evidence were admissible to prove the historical fact of prior convictions, an "intolerable tension" between two constitutional rights would be created, resulting in a forced waiver of one of those rights: either the defendant must give up his constitutional right to testify, or give up his right to have the prosecution prove beyond a reasonable doubt that the defendant had previously been convicted as alleged in the habitual criminal counts.

In my view, the "intolerable tension" doctrine of *Simmons* has no application to this case. In *Simmons* the tension created related to two constitutional rights involved at a critical state of the substantive case. We do not have that situation here. Our concern is with the use of evidence lawfully admitted in the guilt trial for impeachment purposes, which also proves the historical fact of prior convictions at the sentence enhancement proceedings.

The assertion that the burden of proving beyond a reasonable doubt the fact of prior convictions at a sentence enhancement proceeding is a constitutional right is in my view a faulty concept. Sentence enhancement proceedings were unknown at common law and are of statutory origin. *Smalley v. People,* 116 Colo. 598, 183 P.2d 558 (1947). The statute does not create a new or independent crime but merely provides that in sentencing a defendant after conviction the court must consider former convictions and impose a more severe sentence. *Casias v. People, supra.* Since the sentence enhancement proceedings are of a statutory origin, the General Assembly could have established a lesser burden of proof upon the prosecution had it chosen to do so. This is borne out by the decision in *United States v. Inendino,* 463 F. Supp. 252, (1978), *aff'd* 604 F.2d 458 (7th Cir. 1979), *cert. denied,* 444 U.S. 932, 100 S. Ct. 276, 62 L.Ed.2d 57 (1979).

In *Inendino* the court was concerned with the constitutional validity of 19 U.S.C. 3575, the "dangerous special offender" statute, a sentence enhancement statute. The attack on the statute related to the constitutional validity of the burden of proof standard prescribed by Congress, that of

"preponderance of the information." The court upheld that standard in face of the constitutional attack. The court noted that the United States Supreme Court has drawn a fine line between preconviction and post-conviction proceedings, and has approved postconviction proceedings which provide less than the full panoply of trial rights. *See generally Williams v. New York,* 337 U.S. 241, 69 S. Ct. 1079, 93 L.Ed. 1337 (1949); *United States v. Grayson,* 438 U.S. 41, 98 S. Ct. 2610, 57 L.Ed.2d 582 (1978); *United States v. Stewart,* 531 F.2d 326 (1976). In commenting on the due process rights in such proceedings, the Court stated:

> "However, in recognition of the fact that these procedures may result in a substantial deprivation of liberty, the Court has held that the defendant is entitled to representation of counsel, *Chandler v. Fretag,* 348 U.S. 3, 75 S. Ct. 1, 99 L.Ed. 4 (1954), and to notice and opportunity to be heard, *Oyler v. Boles,* 368 U.S. 448, 82 S. Ct. 501, 7 L.Ed.2d 446 (1962). Although the exact dimensions of these rights have not been fully articulated, courts have held that they do not include the right to trial by jury, *see Turnbough v. Wyrick,* 551 F.2d 202 (8th Cir. 1977); *James v. Twomey,* 466 F.2d 718, (7th Cir. 1972), nor the right to grand jury indictment, *United States v. Baca,* 451 F.2d 1112 (10th Cir. 1971); *see also Beland v. United States,* 128 F.2d 795 (5th Cir.), *cert. denied,* 317 U.S. 676, 63 S. Ct. 157, 87 L.Ed. 543, *reh'g denied* 317 U.S. 710, 63 S. Ct. 205, 87 L.Ed. 566 (1942)." *United States v. Inendino, supra.*

In affirming the district court, the United States Court of Appeals for the Seventh Circuit stated:

> "The defendant contends that Section 3575 is constitutionally infirm because the statute authorizes findings of fact 'by [the] preponderance of the information,' rather than by the constitutionally mandated standard of beyond a reasonable doubt. *This section, however, does not create a separate criminal charge but instead provides for the enhancement of the penalty for the defendant's criminal conviction.* Also, the courts of

appeals have uniformly found that the proof of dangerousness by a preponderance of the information is constitutional. *United States v. Williamson*, 567 F.2d 610 (4th Cir. 1977); *United States v. Bowdach*, 561 F.2d 1160 (5th Cir. 1977); *United States v. Stewart 531 F.2d 326 (6th Cir.), cert. denied*, 426 U.S. 922, 96 S. Ct. 2629, 49 L.Ed.2d 376 (1976). *See generally United States v. Neary*, 552 F.2d 1184 (7th Cir.), *cert. denied*, 434 U.S. 864, 98 S. Ct. 197, 54 L.Ed.2d 139 (1977)." (Emphasis added.) *United States v. Inendino*, 604 F.2d 458 (7th Cir. 1979), *cert. denied*, 444 U.S. 932, 100 S. Ct. 276, 62 L.Ed.2d 57 (1979).

The treatment of the federal sentence enhancement statute, 18 U.S.C. 3575,[1] by the federal courts clearly demonstrates that the constitutional right of a defendant to have the prosecution prove the elements of a crime beyond a reasonable doubt does not apply to post-conviction proceedings such as sentence enhancement hearings. Thus, it is clear that the standard of proof at the post-conviction sentence enhancement proceeding is statutory and does not rise to the constitutional level attributed to it by the majority opinion. For this reason, I do not believe that the procedure set down by the trial court in this case creates an "intolerable tension" between *two constitutional rights*, and the *Simmons* rationale is misapplied to the posture of the present case.

The purported burden — the chill — if any, on the defendant's constitutional right to testify did not, in my opinion, arise from any ruling of the trial court in formulating the guidelines for proceeding under the habitual criminal statute or from the announced procedures to be followed, but rather was the result of defendant's own predicament arising from his past lawless conduct, a consequence which every citizen who chooses to engage in such activity ought to anticipate.

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[1] It is interesting to note that the federal statute provides that the burden of proof for enhancement purposes by the preponderance of the information may include information gained at trial on the substantive offense. 18 U.S.C. 3575(b) provides:

The procedures formulated by the trial court conformed to the requirements of due process. The defendant was afforded a separate hearing on the habitual criminal charges with the burden of proof beyond a reasonable doubt placed upon the prosecution. He could be present with counsel, have the opportunity to be heard, to confront the witnesses against him, to cross-examine them, to offer evidence in his own behalf, and to have the findings of the prior convictions made by a jury. This procedure clearly afforded the defendant more protection than the minimums required by *Specht v. Patterson,* 386 U.S. 605, 87 S. Ct. 1209, 18 L.Ed.2d 326 (1967).

The conviction should be affirmed.

I am authorized to say that CHIEF JUSTICE HODGES and JUSTICE ROVIRA join in this dissenting opinion.

"* * *In connection with the hearing, the defendant and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. *A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony* and the sentencing hearing and so much of the presentence report as the court relies upon, *that the defendant is a dangerous special offender,* the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony.* * *" (Emphasis added.)

16-13-101. Punishment for habitual criminals. (1) Every person convicted in this state of any felony for which the maximum penalty prescribed by law exceeds five years who, within ten years of the date of the commission of the said offense, has been twice previously convicted upon charges separately brought and tried, either in this state or elsewhere, of a felony or, under the laws of any other state, the United States, of a crime which, if committed within this state, would be a felony shall be adjudged an habitual criminal and shall be punished by confinement in a correctional facility for a term of not less than twenty-five years nor more than fifty years.

(2) Every person convicted in this state of any felony, who has been three times previously convicted, upon charges separately brought and tried, either in this state or elsewhere, of a felony or, under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States, of a crime which, if committed within this state, would be a felony, shall be adjudged an habitual criminal and shall be punished by imprisonment in a correctional facility for the term of his or her natural life. Such former conviction or convictions and judgment or judgments shall be set forth in apt words in the indictment or information. Nothing in this part 1 shall abrogate or affect the punishment by death in any and all crimes punishable by death on or after July 1, 1972.

(3) No drug law conviction shall be counted as a prior felony conviction under this section unless such prior offense would be a felony if committed in this state at the time of the commission of the new offense.

16-13-103. Verdict of jury. (1) If the fact of previous convictions of other offenses is included in an indictment or information, the jury, if it finds a verdict of guilty of the offense with which he is charged, unless the defendant admits the previous convictions, shall also find whether or not he has suffered such previous convictions.

(2) An information or indictment seeking the increased penalties authorized by section 16-13-101 shall identify by separate counts each alleged former conviction, and it shall be alleged therein that the defendant at a time and place specified was conof a specific feolny. If any such conviction was had outside the state of Colorado, it shall be alleged that the offense, if committed in Colorado, would be a felony.

(3) Upon arraignment of the defendant he shall be required to admit or deny that he has been previously convicted of the crimes identified in the information or indictment, which are enumerated therein pursuant to subsection (2) of this section. If the defendant stands mute it shall be treated as a denial by him that he has been convicted as alleged. If the defendant admits that he has been convicted as alleged in any one or more of the counts charging previous convictions, no proof thereof is required, and upon conviction of the substantive offense, the court shall pass sentence upon the defendant as an habitual criminal.

(4) If the defendant denies that he has been previously convicted as alleged in any count of an information or indictment filed pursuant to subsection (2) of this section, the jury impaneled to try the substantive offense shall determine by separate verdict whether the defendant has been convicted as alleged. The procedure in any case in which the defendant does not become a witness in his own behalf upon the trial of the substantive offense shall be as follows:

(a) The jury shall return a verdict upon the issue of guilt or innocence;

(b) If the verdict is that the defendant is guilty of a felony, then the same jury shall forthwith proceed to try the issues as to whether the defendant has been previously convicted as charged. The prosecuting attorney has the burden of proving beyond a reasonable doubt that the defendant has been convicted as charged.

(5) If upon the trial of the issues upon the substantive offense, the defendant takes the witness stand in his own defense and denies that he has been previously convicted as

alleged, the defendant, and the prosecuting attorney on rebuttal, shall present all evidence relevant to the issues of previous convictions, and the jury shall return verdicts on all issues relating to previous convictions if the defendant is found guilty of the substantive offense.

(6) If the prosecuting attorney does not have any information indicating that the defendant has been previously convicted of a felony prior to the time a verdict of guilty is returned on a felony charge, and if thereafter he learns of the felony conviction prior to the time that sentence is pronounced by the court, he may file a new information in which it shall be alleged in separate counts that the defendant stands convicted of the particular offense upon which judgment has not been entered and that prior thereto at a specified time and place the defendant had been convicted of a felony warranting application of increased penalties authorized in this part 1. The defendant shall be arraigned upon the new information, and if he denies the previous conviction a jury shall be impaneled to determine the issue prior to imposition of sentence upon the verdict of guilty of the substantive offense.

13-90-101. Who may testify - interest. All persons, without exception, other than those specified in sections 13-90-102 tp 13-90-108 may be witnesses. Neither parties nor other persons who have an interest in the event of an action or proceeding shall be excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief. In every case the credibility of the witness may be drawn in question, as now provided by law, but the conviction of any person for any felony may be shown for the purpose of affecting the credibility of such witness. The fact of such conviction may be proved like any other fact, not of record, either by the witness himself, who shall be compelled to testify thereto, or by any other person cognizant of such conviction as impeaching testimony or by any other competent testimony. Evidence of a previous conviction of a felony where the witness testifying was convicted five years prior to the time when the witness testifies shall not be admissible in evidence in any civil action.